IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.523 OF 1986.

1. Union of India;)
2. The Military State)
Officer Pune.).. Appellants.

V/s.

Dorab Godrej Anklesaria;)
1. Smt.Goolcher Dorab Anklesaria)
2. Miss Era Dorab Anklesaria;)
3. Master Geve Dorab Anklesaria.).. Respondent.

.....

Shri M.S.Karnik, advocate appearing for Appellants.

Shri Mohan Pungalia, advocate appearing for Respondents.

CORAM: A.S.OKA, J.

DATED: 25th February, 2005.

JUDGMENT:

1. On 8th January, 1987, this Second Appeal was admitted . The Question of law framed is the question regarding right of resumption of the Government. I have heard the Counsel appearing for the parties. As per office noting, the Appeal stands abated as against Respondent No.1.

2. The Appellants are the original Defendants and the Respondents are the legal representatives of the original Plaintiff. The original Plaintiff

Dorabji instituted a suit challenging notice dated 1st September, 1970 issued by the Appellant for resumption of land below House No.7, Alexander Road, Pune Cantonment, Pune.

3. The original Plaintiff claimed that the property in dispute was of his ownership to the extent of one half share. The original plaintiff's Paternal aunt Alibai was the owner of the remaining half share. The father of the Plaintiff executed a Will dated 11th March, 1939 creating a Trust in respect of the aforesaid half share in the property. The probate of the last Will of the father of the Appellant was obtained and the Plaintiff is claiming to be the full owner of the land with bungalow thereon.

4. Admittedly, the bungalow was leased out to the Garrison Engineer, Pune on payment of Rs.156/- per month. The Appellant/Defendant issued notice dated 1st September, 1970 contending that the property was held on an old grant of 1853 under the condition of G.O.260 of 7th May, 1938. By the said notice, Appellant/Defendant expressed intention to resume the said property. The contention of the Original Plaintiff is that the

said notice is illegal and invalid and the said notice infringes the rights of the original Plaintiff conferred by Articles 14 and 19 of the Constitution of India.

5. The suit was contested by the Respondents by contending that the property in dispute was originally owned by the Government of India and that the same was granted to the forefathers of the Appellants on an old grant. Under the terms and conditions of the said old grant, a right to resume the land was allegedly kept with the Government of India. The case made out is that the land can be resumed by Government of India by giving one month's notice and by offering compensation in respect of the structure erected on the site with proper sanction of the competent authority. According to the Appellants, by notice dated 1st September, 1970, the power of resumption was exercised under the Terms and conditions of the said old grant.

6. The learned Trial Judge dismissed the suit. An Appeal was preferred by the original Plaintiff to the District Court. By the impugned Judgment and Decree dated 11th October, 1985, the

said Appeal has been allowed. It is held that the notice dated 1st September, 1970 is invalid and in operative. By the said decree the Appellants were restrained from taking possession of the property in question.

7. Shri Karnik, the learned Counsel appearing for Appellants submitted that the original Plaintiff can not claim a right in respect of the land below bungalow as the rights conferred by him by the Will by his father are confined only to the structure of bungalow No.7. He submitted that the Appellant No.1 being Union of India, the burden was on original Plaintiff to establish his title and the burden could not have been shifted on the Appellant No.1 by the Appellate Court. He submitted that extract of General Land Register at Exh.81 had presumptive value and as the original Plaintiff failed to rebut presumption, it was obvious that the Appellant No.1 has established the title. He pointed out that in the document dated 8th November, 1947, there is a clear admission as regards title of the Appellant No.1 and the said admission is binding on the original Plaintiff. He submitted that on the basis of the terms and conditions of the old grant, the

Appellant No.1 had absolute right of resumption.

8. Shri Pugalia, the learned Counsel appearing for Respondent No.2 and 3 has drawn my attention to the impugned Judgment and decree. He has taken me through the findings recorded by the Appellate Court. He submitted that the findings being essentially findings of fact, interference under Section 100 of Code of Civil Procedure,1908 was not permissible.

9. I have considered rival submissions. Apart from issue relating to the title claimed by the rival parties, the real issue is whether there is a right vesting in the Appellants to resume the land which is admittedly in possession of the Respondents/Plaintiffs. Even assuming that the Appellant No.1 is the owner of the land and the Respondents/Plaintiffs are in unauthorised possession of the land or that the Appellant No.1 is entitled to recover possession of the land from Respondents, the Appellants will have to take recourse to due process of law. Real question is whether the right of resumption can be exercised by the Appellants by sending a notice.

10. The right of resumption is claimed by the Appellants only on the basis of terms and conditions of the old grant. The case of the Appellants is that the land was granted to the predecessor of the original Plaintiff on old grant and therefore, terms and conditions which are attached to the old grant are binding on the plaintiff. The Appellate Court has held that the old grant is not placed on record. The Appellate Court has held that in absence of the old grant, it is not possible to verify as to what were the terms and conditions on which lands were granted to forefathers of the original Plaintiffs. The learned District Judge placed reliance on Judgment of this Court reported in **AIR 1980 Bom.Page 9 (Phiroza Temulji Anklesaria Vs. N.C. Vashistha).**

11. The Appellate Court observed that oral evidence was not led by the Appellants. In paragraph-9 of the Judgment, the Appellate Court held that the Appellants could not establish that there is a power vested in the Appellant No.1 to resume the land as old grant was not placed on record. The finding of the fact recorded by the Appellate Court is that the Appellants have not established that the land was allotted to the

forefathers of the original Plaintiff on what is known as "old grant basis". The right to resume the land as claimed by the Appellants flows only from the said old grant. All that the learned District Judge has held is that in absence of any document showing old grant, it is not possible to accept that the Appellants have right to resume the land.

12. Reliance was placed by the Appellants on certain documents executed by Meher Dorabji and Jehangir Dorabji who were claiming to be the executors appointed under Original Will of the father of the original plaintiff. The said two persons have executed an Agreement which according to the Appellants shows that they accepted the title of the Appellant No.1. The Appellate Court held that in the Will of the deceased father of the original Plaintiff, two persons are referred to as Trustees. The Appellate Court held that there are no documents on record to show that the said Meher Dorabji and Jehangir Dorabji were appointed as Trustees by the first two Trustees appointed under the Will. The Appellate Court held that in any event, the alleged admission given by the said two persons will not bind the

original Plaintiff.

13. It must be noted here that there is no specific point for determination framed by the Appellate Court as regards claim of the ownership of the Appellants. From paragraph-4 of the Appellate Court Judgment, it appears that the only questions which were framed by the learned Appellate Court were regarding existence of old grant and the question whether there was power to resume under the old grant. There is no adjudication made by the Appellate Court specifically on the issue of title. The net result of the discussion is that as old grant was not brought before the Court, the Appellants have failed to establish that they have right to resume the land by sending the impugned notice. The finding of fact recorded by the Appellate Court is that unless the old grant was placed on record, terms and conditions thereof cannot be ascertained. There is no reason to find fault with the said finding recorded by the Appellate Court.

14. The operative part of the Decree passed by the Appellate Court read thus :

> ". Appeal is allowed with costs. Judgment and decree of the trial Court is set aside. The claim as so preferred by the Plaintiff-Appellant is allowed with costs and it is declared that the notice dated 1st September 1970 and the subsequent resumption proceedings are illegal, invalid and inoperative. The Respondents-Defendants are permanently restrained from taking possession of the property in question. Decree be drawn up accordingly."

In my view, the Respondents have succeeded because right to resume the land under the terms and conditions of the old grant was not proved by the Appellants. Therefore, the Appellants cannot be restrained perpetually from taking possession of the property in question. The Appellants can always follow due process of law and principles of natural justice and initiate action for resuming possession provided they are entitled to possession in accordance with the law. To that extent, the Appeal preferred by the Appellants will have to be allowed. Hence I pass following

order.

ORDER

(i) Following sentence in the operative part of the Decree passed by the Appellate Court -

"The Respondents-Defendants are permanently restrained from taking possession of the property in question."

shall be substituted by following sentence-

"The Respondents-Defendants are permanently restrained from taking possession of the property in question without following due process of law."

(ii) It is made clear that the issue regarding title is kept open.

(iii) Subject to what is stated in the Judgment, rest of the decree passed by the Appellate Court is confirmed.

(iv) The Appeal is partly allowed in above terms with no order as to costs.

(v) Parties to act on the authenticated copy of this order.

JUDGE